Before the
MINERALS MANAGEMENT SERVICE
U.S. DEPARTMENT OF THE INTERIOR
Washington, D.C.

In the Matter of Alternate Energy-Related Uses on the Outer Continental Shelf	RIN 1010-AD30

COMMENTS OF
THE NORTH AMERICAN SUBMARINE CABLE ASSOCIATION

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The North American Submarine Cable Association ("NASCA") urges the Minerals Management Service ("MMS") to clarify how its proposals to implement Section 388(a) of the Energy Policy Act will impact undersea telecommunications cables.[1] *First*, MMS should clarify that its proposals to regulate offshore energy development from sources other than oil and gas, and to regulate alternate uses of existing facilities, do not extend to undersea telecommunications cables. Some of MMS's statements in its ANRPM could be construed to suggest that the U.S. Government exercises permitting jurisdiction over undersea telecommunications cables on the outer Continental Shelf, when in fact U.S. laws and treaty obligations preclude such exercises of permitting jurisdiction. Permitting jurisdiction under the Outer Continental Shelf Lands Act—

[1] *See* Alternate Energy-Related Uses on the Outer Continental Shelf, Advanced Notice of Proposed Rulemaking, 70 Fed. Reg. 77,345 (Dec. 30, 2005) ("ANPRM"); Section 388(a) of the Energy Policy Act, Pub. L. No. 109-58, *codified at* 43 U.S.C. § 1337(p) ("Section 388(a)").

whether exercised by the Secretary of the Interior or the Secretary of the Army—is limited to activities connected with the exploration and exploitation of mineral resources on the outer Continental Shelf.[2] *Second*, MMS should clarify how it intends to coordinate energy-related activities for which it issues, or intends to issue, leases, easements, or rights of way with installation and maintenance activities by undersea telecommunications cable operators.

NASCA is a non-profit association of submarine cable owners, submarine cable maintenance authorities, and prime contractors for submarine cable systems.[3] NASCA and its members have a strong interest in protecting the marine environment without unduly limiting undersea cable infrastructure necessitated by consumer demand for bandwidth capacity. For decades, NASCA's members have worked with federal, state, and local government agencies, as well as other concerned parties—such as commercial fishermen and private environmental organizations—to ensure that submarine cables do not harm the marine environment or unreasonably constrain the operations of others in that environment.

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[2] *See* Pub. L. No. 83-212, 67 Stat. 462 (Aug. 7, 1953) ("OCSLA 1953"), Pub. L. No. 93-627, 88 Stat. 2146 (Jan. 3, 1975) ("OCSLA 1975 Amendments"), Pub. L. No. 95-372, 92 Stat. 635 (Sept. 18, 1978) ("OCSLA 1978 Amendments") *codified at* 43 U.S.C. § 1331 *et seq.* (collectively, "OCSLA").

[3] NASCA's members include: Alaska United Fiber System Partnership; Alcatel Submarine Networks; Apollo Submarine Cable System Ltd.; AT&T, Inc.; Brasil Telecom of America, Inc. / GlobeNet; Global Crossing Ltd.; Global Marine Systems Limited; Hibernia Atlantic; Level 3 Communications, LLC; New World Network, USA, Inc.; Southern Cross Cables Limited; Sprint Nextel Corp.; Tyco Telecommunications (US) Inc; Verizon Communications, Inc.; and VSNL International, Inc.

NASCA's comments on MMS's ANPRM consist of two parts. *First*, NASCA explains that the United States lacks permitting jurisdiction over undersea telecommunications cables on the outer Continental Shelf. *Second*, NASCA addresses the need for better understanding of undersea telecommunications cable operations and coordination with other operations on the outer Continental Shelf.

I. MMS Should Clarify that Its Proposals to Regulate Certain Activities Pursuant to Section 388(a) Do Not Extend to Undersea Telecommunications Cables on the Outer Continental Shelf, As Such Cables Lie Beyond the Permitting Jurisdiction of Any Federal Agency

MMS should clarify that its proposals to regulate certain activities pursuant to Section 388(a) do not extend to undersea telecommunications cables on the outer Continental Shelf, as such cables lie beyond the permitting jurisdiction of any federal agency. *First*, MMS has proposed to issue leases, easements, and rights of way for activities that "[u]se, for energy-related purposes or other authorized marine-related purposes, facilities currently or previously used for activities authorized under the OCSLA."[4] *Second*, MMS has specifically identified "telecommunications facilities" as "[a]lternate uses of existing facilities."[5] These statements suggest that MMS may be considering direct regulation of undersea telecommunications cables or, more indirectly, endorsing illegal and extraterritorial assertions of permitting jurisdiction by the U.S. Army Corps of Engineers ("Army Corps"). As discussed below, federal law and U.S. treaty obligations preclude MMS or the Army Corps from asserting such regulatory jurisdiction over undersea telecommunications cables.

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4 ANPRM, 70 Fed. Reg. at 77,346.

5 *Id.*

A. OCSLA's Plain and Unambiguous Language Provides Neither MMS Nor Any Other Federal Agency with Regulatory Jurisdiction over Submarine Telecommunications Cables on the Outer Continental Shelf

OCSLA's plain and unambiguous language grants no federal agency regulatory jurisdiction over undersea telecommunications cables on the outer Continental Shelf. By its terms, OCSLA pertains to the "exploration, development, and production of the minerals of the outer Continental Shelf."[6] More specifically, OCSLA grants the Secretary of the Interior the authority to grant and regulate offshore leases, easements, and rights of way pertaining to minerals exploration and exploitation. OCSLA grants the Secretary of the Army—and by delegation, the Army Corps—limited jurisdiction over two specified classes of activities: (1) artificial islands, installations, and other devices attached to the seabed and intended for exploring for, developing, or producing mineral resources, and (2) installations or devices intended for transporting mineral resources—classes of activities that plainly exclude submarine telecommunications cables. Neither of these grants of regulatory authority covers activities connected with the installation, maintenance, or repair of undersea telecommunications cables.

[6] 43 U.S.C. § 1332(4). *See also* H.R. Rep. No. 83-413, at 2-3 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2177 (noting that the Outer Continental Shelf Lands Act was passed to regulate the "leasing and development . . . of the oil potential of the Continental Shelf.").

1. OCSLA Permits Regulation of the Exploration, Development, and Production of the Outer Continental Shelf's Minerals Resources—Classes of Activities that Plainly Exclude Submarine Telecommunications Cables

In a section titled "Laws and regulations governing lands,"[7] OCSLA explicitly extended federal jurisdiction—of any agency, not just the Army Corps—and of certain enumerated laws to the outer Continental Shelf only with respect to regulation of a specific class of activities:

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon *for the purpose of exploring for, developing, or producing resources therefrom*, or any such installation or other device (other than a ship or vessel) *for the purpose of transporting such resources*, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State.[8]

Thus, Section 1333(a)(1) provides that U.S. jurisdiction extends not over all artificial islands, installations, and other devices on the outer Continental Shelf, but only to two subsets of artificial islands, installations, and other devices: (1) those attached to the seabed and intended for exploring for, developing, or producing mineral resources, and (2) those intended for transporting mineral resources.

Section 1333(a)(1) establishes the jurisdictional scope of Section 1333. And it forms the basis for a coherent statutory scheme that consistently limits the grants of regulatory jurisdiction to other agencies and the applicability of other laws in other subsections of Section 1333. Thus, Section 1333(a)(1) clearly provides that no U.S. Government agency or department—including

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[7] 43 U.S.C. § 1333 ("Section 1333").

[8] 43 U.S.C. § 1333(a)(1) ("Section 1333(a)(1)") (emphasis added).

the Coast Guard[9] and the Army Corps[10]—has any jurisdiction or permitting authority on the outer Continental Shelf except with respect to two enumerated subsets of artificial islands, installations, and other devices intended for mineral resource-related activities. Section 1333(a)(1) further provides that National Labor Relations Act applies only with respect to two enumerated subsets of artificial islands, installations, and devices intended for mineral resource-related activities,[11] and that the application of Section 1333 with respect to artificial islands, installations, and devices intended for mineral resource-related activities is non-exclusive.[12]

Undersea telecommunications cables are neither seabed nor subsoil of the outer Continental Shelf, nor are they artificial islands, installations, or devices erected for the purpose of exploring for, developing, producing, or transporting mineral resources. Consequently, undersea telecommunications cables on the outer Continental Shelf fall outside the permitting jurisdiction of the U.S. Government.

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9 43 U.S.C. § 1333(d)(1) (granting authority to the Coast Guard with respect to "lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the *artificial islands, installations, and other devices referred to in subsection (a)* of this section or on the waters adjacent thereto" (emphasis added)).

10 43 U.S.C. § 1333(e).

11 43 U.S.C. § 1333(c) (providing that the National Labor Relations Act applies to "any unfair labor practice, as defined in such Act, occurring upon any *artificial island, installation, or other device referred to in subsection (a)* of this section" (emphasis added)).

12 43 U.S.C. § 1333(f) (providing that the specific application of certain provisions of law to "the *artificial islands, installations, and other devices referred to in subsection (a)* of this section or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended" (emphasis added)).

2. OCSLA Authorizes the Secretary of the Interior to Regulate Energy-Related Activities and Alternate Uses of Energy-Related Facilities

OCSLA authorizes the Secretary of the Interior—and by delegation, MMS—to regulate energy-related activities and alternate uses of energy-related facilities, but not undersea telecommunications cables. Specifically, OCSLA directs the Secretary of the Interior to grant oil and gas leases to the highest qualified responsible bidder on the basis of sealed competitive bids and to develop regulations necessary to carry out such provisions of OCSLA.[13] Section 388(a) expanded the Secretary of the Interior's regulatory authority to include leases, easements, and rights of way for activities that "produce or support production, transportation, or transmission of energy from sources other than oil and gas," *e.g.*, wind power.[14]

Section 388(a) also provides that the Secretary of the Interior:

> may grant a lease, easement, or right-of-way on the outer Continental Shelf for Activities not otherwise authorized in this Act [or certain other laws not relevant here] if those activities—
>
> (D) use, for energy-related purposes or for other authorized purposes, facilities currently or previously used for activities authorized under this Act.[15]

Thus, Section 388(a) gives the Secretary of the Interior authority to regulate new uses—whether energy-oriented or not—of facilities originally authorized and constructed under the authority of OCSLA, *i.e.*, those dedicated to minerals exploration and exploitation.[16] Neither this authority to

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[13] 43 U.S.C. §§ 1334-38.

[14] 43 U.S.C. § 1337(p)(1).

[15] *Id.*

[16] *See* 43 U.S.C. § 1333(a).

regulate new uses of energy-related facilities, nor the authority to regulate energy activities other oil and gas-related activities, extends to undersea telecommunications cables.

3. The Army Corps Lacks a Statutory Mandate to Regulate All Artificial Islands, Installations, and Other Devices in the Subsoil or on the Seabed of the Outer Continental Shelf and—by Extension—Undersea Telecommunications Cables

Notwithstanding its claims to the contrary, the Army Corps lacks a statutory mandate to regulate all artificial islands, installations, and other devices in the subsoil or on the seabed of the U.S. outer Continental Shelf and—by extension—undersea telecommunications cables. Instead, OCSLA grants the Secretary of the Army (who has delegated this authority to the Army Corps) limited jurisdiction over two specified classes of activities: (1) artificial islands, installations, and other devices attached to the seabed and intended for exploring for, developing, or producing mineral resources, and (2) installations or devices intended for transporting mineral resources.

OCSLA granted to the Secretary of the Army limited authority to prevent obstruction of navigable waters by activities relating to exploration for, development, production and transportation of mineral resources of the outer Continental Shelf.

> The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to the artificial islands, installations, and other devices *referred to in subsection (a) of this section*.[17]

Thus, OCSLA grants the Army Corps jurisdiction only over a specified class of activities—those specified in Section 1333(a)(1)—to the extent they may obstruct navigation. By its own terms, Section 1333(e) does not extend to a class of activities beyond those enumerated in Section

[17] OCSLA § 4(f), *codified as amended at* 43 U.S.C. § 1333(e) ("Section 1333(e)") (emphasis added).

1333(a)(1). Nowhere does OCSLA suggest or provide for any possibility of the Army Corps asserting jurisdiction over *all* artificial islands, installations, and other devices attached to the seabed.

Regardless of whether undersea telecommunications cables are artificial islands, installations, or other devices attached to the seabed—and NASCA maintains that they are none of these things—they are not used for exploring for, developing, producing, or transporting mineral resources. Undersea telecommunications cables use coaxial cable or fiber-optics to transmit voice, fax, data, and Internet traffic between domestic and international points. As such, they remain outside the general jurisdictional scope of OCSLA (as defined in Section 1333(a)(1)) and outside the specific regulatory jurisdiction of the Army Corps under OCSLA (as defined in Section 1333(e)).

The statutory language of the OCSLA 1978 Amendments clarified that Congress granted the Army Corps only limited jurisdiction. In those amendments, Congress revised the language of Section 1333(e), striking out "artificial islands and fixed structures located on the outer Continental Shelf" and replacing it with "the artificial islands, installations, and other devices referred to in subsection (a)." Of course, Subsection (a)—*i.e.*, Section 1333(a)(1)—limits the scope of any grant of agency regulatory jurisdiction or applicability of enumerated laws, as provided in Section 1333's various subsections, to artificial islands, installations, and devices intended for mineral resource-related activities.

Notwithstanding OCSLA's clear language, federal appellate courts have managed to disagree on the scope of federal authority over the outer Continental Shelf. The Fifth Circuit takes the view that:

> '[T]the Continental Shelf Act was enacted for the purpose, primarily, of asserting ownership of and jurisdiction over the minerals in and under the Continental Shelf.' The structure of the Act itself, which is basically a guide to the administration and leasing of offshore mineral-producing properties, reinforces this conclusion. The Act consists almost exclusively of specific measures to facilitate exploitation of natural resources on the continental shelf. In addition, 43 U.S.C. § 1332(b) provides that the Act 'shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.' As the court below noted, an extension of jurisdiction for purposes of controlling the exploitation of the natural resources of the continental shelf is not necessarily an extension of sovereignty.
>
> We believe that a limited construction of the Act comports with the primary purpose of resolving competing claims to ownership of the natural resources of the offshore seabed and subsoil. So read, the Act is consistent with Article 2 of the Convention on the Continental Shelf.[18]

Thus, the Fifth Circuit found OCSLA's statutory language and the relevant treaty provisions dispositive on the question of the Army Corps' jurisdiction.

By contrast, the First Circuit takes a more expansive view of the Army Corps' authority under OCSLA, and in direct opposition to the Fifth Circuit. In *Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of the Army*, the First Circuit held that OCSLA gave the Army

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[18] *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 340 (5th Cir. 1978) (holding that the United States did not have title under OCSLA over a wrecked and abandoned vessel on the outer Continental Shelf because OCSLA was not a general extension of U.S. sovereignty, quoting *Guess v. Read*, 290 F.2d 622, 625 (1961), *cert. denied* 368 U.S. 957 (1962)), *aff'd in part and rev'd in part on other grounds sub nom. Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). *See also Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1227 n.4 (5th Cir. 1985) (reiterating that "[i]n *Treasure Salvors*, we were faced with the question whether the United States had title under the OCSLA over a wrecked and abandoned vessel lying on the bottom of the ocean on the Outer Continental Shelf. We held that the OCSLA was not a general extension of United States sovereignty but must be construed to comport with its limited purpose of controlling the exploration of natural resources on the Continental Shelf."). Regarding the Convention on the Continental Shelf, see part I.B below.

Corps authority to issue a permit for a scientific measurement device station to be erected in connection with an offshore "wind farm" project, as the statutory language of Section 1333 was ambiguous and the "exceptional clarity" of the legislative history evidenced congressional intent not to limit the Army Corps's permitting jurisdiction to structures related to minerals extraction.[19] In NASCA's view, the First Circuit found OCSLA ambiguous only because it failed to quote Section 1331(a)(1) in full, and it ignored the Convention on the Continental Shelf.[20] Moreover, NASCA believes that the legislative history of Section 1333 is internally inconsistent and appears to conflict with the text of Section 1333, thereby providing no clear sense of congressional intent.[21]

Absent resolution of this "circuit split" by the U.S. Supreme Court, the Army Corps continues to interpret its jurisdiction expansively, issuing permits which include conditions extending to the edge of the Continental shelf. For example, the Army Corps has affirmatively

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[19] 398 F.3d 105, 109 (2005).

[20] *See id.* (omitting the phrase "which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources").

[21] *See Joint Explanatory Statement of the Committee of Conference*, H.R. Conf. Rep. No. 95-1474, at 81 (1978) ("*Explanatory Statement*") (stating that "[u]nder section 4(a)(1) of the conference report, Federal laws and 'civil and political jurisdiction of the United States' are applicable to the subsoil and seabed of the OCS, to all artificial islands and 'all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon' to explore, develop, produce or transport OCS mineral resources"), *reprinted in* 1978 U.S.C.C.A.N. 1674, 1679. But see *Explanatory Statement* at 81 (stating that "these changes were technical only and there was no intent to change present law. The existing authority of the Corps of Engineers, in subsection 4(f), applies to all artificial islands and fixed structures on the Outer Continental Shelf, whether or not they are erected for the purpose of exploring for, developing, removing, and transporting resources therefrom."). These conflicting statements appear on the same page of the same report.

asserted that its jurisdiction extends to the edge of the Continental Shelf in the following cases:

- ***Hibernia Cable Permit***: The Army Corps' New England District (Concord Office) issued this permit to Worldwide Telecom, Inc. (now known as Hibernia Atlantic) pursuant to Section 4(f) of the Outer Continental Shelf Lands Act of 1953.[22] The permit imposes general burial requirements with respect to submerged aquatic vegetation and marine mammals.

- ***Japan-U.S. Cable Network Permit***: The Army Corps' San Francisco District Office issued this permit to Brunghardt Honomichl & Company on behalf of AT&T under the Army Corps' Nationwide Permit 12, pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act, and "as extended by Section 4(f) of the Outer Continental Shelf Lands Act of 1953, as amended (43 U.S.C. 1333(e))."[23] The permit claims that "Section 10 regulates structures, other installations, and work, including excavation, dredging, and discharges of dredged or fill material in navigable waters, extending from mean high water *to the seaward limit of the outer continental shelf*."[24] Special Condition 5 imposes burial and reburial conditions "[w]ithin the seaward limits of the outer continental shelf."[25]

In other cases, the Army Corps has adopted conditions—requiring cable burial out to a particular depth or compliance with state regulatory requirements, which often extend far into the outer Continental Shelf, notwithstanding statutory and judicial limitations on state jurisdictional assertion—that effectively extend its jurisdiction to the outer Continental Shelf.[26] None of these conditions has any proper statutory basis.

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[22] *See* Permit No. 199902369, at p. 4, Special Conditions 2 & 4 (Apr. 6, 2000). As the permit document reveals, this citation appears to have been pasted in over the standard form's citation to Section 10 of the Rivers and Harbors Act of 1899.

[23] *See* Letter from Calvin C. Fong, Chief, Regulatory Branch, San Francisco District, Army Corps, to Chris Brungardt, Brungardt Honomichl & Company, File No. 2S0030N, at p. 2 (Sept. 22, 2000).

[24] *Id.* (emphasis added).

[25] *Id.*

[26] *See, e.g.*, Permit 2000-01196, at p. 2, Special Condition B (Jan. 12, 2001) (imposing general burial requirements to a depth of 1,000 meters in a permit issued to TyCom Networks (US) Inc. by the Army Corps' New York District (New York Office)).

B. MMS Must Read OCSLA Consistent with U.S. Treaty Obligations, Which Afford Special Protections to Undersea Telecommunications Cables

MMS must read OCSLA consistent with U.S. treaty obligations, which afford special protections to undersea telecommunications cables. These treaty obligations are binding on the United States, and supercede earlier conflicting federal statutes.[27]

1. Various International Treaties, to Which the United States is a Party, Guarantee Unique Freedoms to Undersea Telecommunications Cables

Various international treaties dating back to 1884—all to which the United States is a party—guarantee unique freedoms to undersea telecommunications cables.[28] In coastal areas, these treaty obligations include the freedom to lay submarine cables on continental shelves—notwithstanding any claim of a 200-nautical-mile Exclusive Economic Zone ("EEZ")[29]—and to repair existing cables without prejudice.[30] Although these treaties permit coastal sovereign

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[27] *See* U.S. Constitution, art. VI, § 2 (stating that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land").

[28] *See* International Convention for the Protection of Submarine Cables, March 14, 1884, 24 Stat. 989, 25 Stat. 1424, T.S. 380 (entered into force definitively for the United States on May 1, 1888) (guaranteeing the freedom to lay undersea telecommunications cables on the bed of high seas); Geneva Convention on the High Seas, arts. 2, 26.1 & 26.2, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82 (entered into force definitively for the United States on Sept. 30, 1962) (guaranteeing the freedom to lay and maintain undersea telecommunications cables on the bed of high seas).

[29] *See* Convention on the Continental Shelf, art. 4, April 29, 1958, 15 U.S.T. 471, T.I.A.S. 5578, 499 U.N.T.S. 311 (entered into force definitively for the United States on June 10, 1964) ("Continental Shelf Convention"); United Nations Law of the Sea Convention, arts. 58.1, 79.2, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force on Nov. 16, 1994) ("UNCLOS"). Although UNCLOS has not yet been ratified by the Senate, the United States has taken the position that UNCLOS reflects customary international law to which the United States adheres. *See* 19 Weekly Comp. Pres. Doc. 383 (March 10, 1983).

[30] *See id.*, art. 79.5.

nations to take reasonable measures respecting natural resource exploitation on the Continental Shelf, they bar nations from taking such measures with respect to submarine telecommunications cables, the construction and repair of which are not undertaken for natural resource exploration or exploitation.[31]

These treaty provisions are reflected in the official position of the United Nations' Office of Legal Affairs of the Division for Ocean Affairs and the Law of the Sea, which states that:

> beyond the outer limits of the 12 nm territorial sea, the coastal State may not (and should not) impede the laying or maintenance of cables, even though the delineation of the course for the laying of pipelines [but not submarine cables] on the continental shelf is subject to its consent. The coastal State has jurisdiction only over cables constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.[32]

Thus, according to the United Nations, a coastal nation must forbear from imposing any restrictions on the installation or maintenance of submarine cables unless those submarine cables themselves are used for natural resource exploration or exploitation.

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[31] UNCLOS, art. 79.2; Continental Shelf Convention, art. 4. By Presidential Proclamation, Presidents Reagan and Clinton expressly stated that the establishments of an EEZ and a contiguous zone, respectively, did not infringe on the high-seas freedoms to lay and repair submarine cables. *See* Presidential Proclamation No. 5030 (Mar. 10, 1983), 48 Fed. Reg. 10,605 (1983) (establishing the U.S. EEZ); Presidential Proclamation No. 7219 (Aug. 2, 1999), 48 Fed. Reg. 48,701 (1999) (establishing the U.S. contiguous zone).

[32] "Maritime Space: Maritime Zones and Maritime Delimitations—Frequently Asked Questions" (Office of Legal Affairs, DOALS, U.N. Secretariat) (responding to Question #7, "What regime applies to cables and pipelines?"), *available at* <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/frequently_asked_questions.htm>.

2. The Convention on the Continental Shelf Does Not Grant the United States Sovereignty Over the Seabed and Subsoil of the Outer Continental Shelf, But Instead Only the Jurisdiction Necessary for and Connected with the Exploration and Exploitation of Mineral Resources

The Convention on the Continental Shelf, which the United States has signed and ratified, does not grant the United States sovereignty over the seabed or subsoil of the outer Continental Shelf, but instead only the jurisdiction necessary for and connect with the exploration and exploitation of mineral resources. MMS must therefore construe OCSLA (originally enacted in 1953) consistent with the superseding 1958 Convention on the Continental Shelf, which the United States has signed and ratified:

> The Convention on the Continental Shelf became effective as law in the United States eleven years after passage of the Outer Continental Shelf Lands Act and superseded any incompatible terminology in the domestic statute.[33]

The court in *Treasure Salvors* affirmed the trial court's finding that the United States had no claim to an abandoned vessel situated on the outer Continental Shelf because the vessel constituted "non-resource-related material in the shelf area."[34] The court found that the drafters of the Continental Shelf Convention were:

> . . . unwilling to accept the sovereignty of the coastal State over the seabed and subsoil of the continental shelf. . . . the text as now adopted leaves no doubt that the rights conferred upon the coastal state cover all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf.[35]

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[33] *Treasure Salvors*, 569 F.2d at 340. *See also* Continental Shelf Convention, art. 4.

[34] *Treasure Salvors*, 569 F.2d at 340.

[35] *Id.* quoting 11 U.S. GAOR, Supp. 9 at 42, U.N. Doc. A/3159 (1956) (noting that the International Law Commission, which drafted the Continental Shelf Convention, "accepted the idea that the coastal State may exercise control and jurisdiction over the continental shelf, with the proviso that such control and jurisdiction shall be exercised *solely for the purpose of*

[Footnote continued on next page]

On those grounds, it rejected the U.S. Government's claim under OCSLA to a wrecked and abandoned vessel lying on the outer Continental Shelf.[36]

In implementing Section 388(a), MMS should therefore decline to assert permitting jurisdiction over undersea telecommunications cables and decline to endorse the Army Corps' illegal and extraterritorial assertions of permitting jurisdiction. Such exercises of jurisdiction would be inconsistent with OCSLA and U.S. treaty obligations.

II. MMS Should Clarify How It Intends to Coordinate Energy-Related Activities (for Which It Issues, Or Intends to Issue, Leases, Easements, or Rights of Way) With Installation and Maintenance Activities by Undersea Telecommunications Cable Operators

MMS should clarify how it intends to coordinate energy-related activities for which it issues, or intends to issue, leases, easements, or rights of way with installation and maintenance activities by undersea telecommunications cable operators. With additional activities contemplated for the outer Continental Shelf, NASCA believes that federal agencies and private entities operating on the outer Continental Shelf need a better understanding of the activities of undersea telecommunications cable operators on the outer Continental Shelf, in order to minimize conflict among parties operating on the outer Continental Shelf.

[Footnote continued from previous page]
exploiting its resources; and it rejected any claim to sovereignty or jurisdiction over the superjacent waters." (emphasis added)).

[36] *Treasure Salvors*, 569 F.2d at 340.

A. MMS Coordination Efforts Should Account for the Particular Requirements of Undersea Telecommunications Cable Installations and Repairs

MMS must account for the nature of cable installation and repair operations above and below the ocean surface, and the consequent industry standards that have been developed over many decades to facilitate those operations. These standards minimize the risk of damage to neighboring cables during installation and maintenance operations and ensure access to a damaged cable with both a cable ship and other equipment to be used on the sea floor.

The submarine cable industry has developed cable spacing standards to ensure that installation and maintenance operations do not jeopardize other submarine cables.[37] These spacing requirements are consistent with international treaties granting to submarine cable operators without limitation various rights and freedoms to lay submarine cables.

1. Minimum Cable Separation Distances

Cables can be placed only so close to each other until they endanger other cables during installation and maintenance, or until they impede access for installation and maintenance—particularly if there are multiple installation and maintenance companies operating in the same vicinity above or below the ocean surface. The submarine cable industry therefore developed the following minimum cable separation distances. First, two parallel cables are to be separated by a distance equal to the lesser of three (3) times the depth of water or nine (9) kilometers.[38] Second, if both operators of parallel cables agree, those two cables may be separated by a

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[37] Each installation and maintenance company also has more specific methods for handling cable per each cable manufacturer's recommendations.

[38] *See* International Cable Protection Committee Recommendation No. 2, at 10, available from the International Cable Protection Committee at http://www.iscpc.org/.

distance equal to the lesser of two (2) times the depth of water, or (6) six kilometers.[39] For example, a cable in 100 meters of water should be placed no closer than 300 meters to any other cable for any significant parallel length.

While the submarine cable operators may agree to place the cables as little as 200 meters apart—either because the length of the parallel is short or the probability of damage and repair is low—most operators take a more conservative approach to cable separation distances. The "three-times-the-depth-of-water" standard allows the repair ship to lay the repaired cable back flat on the seabed without laying it over the adjacent cable.

Submarine cable operators also use this standard as a minimum separation distance from other obstacles, such as seamounts, canyons, wrecks, and fish havens. Where the obstacles are manmade and actively used—such as the anchorages and dredging and dumping areas of third parties—submarine cable operators actively seek even greater separation distances.

2. Cable Crossing Standards

Notwithstanding these minimum separation distances, cables are generally not placed along parallel tracks for long distances. Submarine cable installers and operators prefer to have the cables cross so that they may achieve greater separation distances for greater lengths of the cables, with the cables in close proximity only where they cross. As described above, they do this to minimize the risk of damage to other cables during installation and maintenance operations, and also to ensure route diversity across a number of cables. This route diversity preserves connectivity between domestic or international points—for a single cable system, or across systems in a region.

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[39] *See id.*

The submarine cable industry has therefore developed the following cable crossing standard: when cables must cross, they should do so at 90-degree angles in order to minimize the length of cable that is immediately adjacent to another cable.[40] Observance of this standard means that in the area of a crossing, the amount of lateral space required for two cables is the equivalent of what would otherwise be sufficient for three cables.

Where cables parallel each other in close proximity, the degree of complexity for any repair operation is increased. It is standard procedure for cable operators to consult with each other when planning a crossing, and to seek permission for a crossing.[41] Although permission is generally granted, there have been instances where the crossing company assumes liability for damage of the crossed cable if the crossing is planned in a congested area or in proximity to a repeater or other underwater body.

B. MMS Should Explain How It Intends to Implement the Outer Continental Shelf Mapping Provisions of Section 388(b) of the Energy Policy Act of 2005

MMS should explain how it intends to implement the outer Continental Shelf mapping provisions of Section 388(b) of the Energy Policy Act of 2005 ("Section 388(b)"). Section 388(b) directs the Secretary of the Interior to establish an interagency comprehensive digital mapping initiative for the outer Continental Shelf, including indications of the locations on the outer Continental Shelf of all federally-permitted activities, obstructions to navigation, submerged cultural resources, undersea cables, offshore aquaculture projects, and areas designated for the purpose of safety, national security, environmental protection, or conservation

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[40] *Id.,* at 5.

[41] *Id.*, at 4.

and management of living marine resources. Such an initiative could foster greater awareness of activities on the outer Continental Shelf and minimize conflict among parties operating on the outer Continental Shelf.

CONCLUSION

For the reasons stated above, the North American Submarine Cable Association urges MMS to clarify how its proposals to implement Section 388(a) of the Energy Policy Act will impact undersea telecommunications cables.

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THE NORTH AMERICAN
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